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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 57

CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHON ORGANIZATIONS, etc.,

Petitioner,

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., *et al.*, etc.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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National Labor Relations Act (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 141 *et seq.*):	
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CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHONE ORGANIZATIONS, ETC., PETITIONER

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR. *et al.*, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Charles H. Parsons, Individually and as President of the United Telephone Organizations, *etc.*, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on February 20, 1950, reversing an order of the United States District Court of the District of Columbia and instructing that Court to dismiss the cause for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action.

Opinion Below.

The opinion of the Court of Appeals has not yet been officially reported. It appears at page 23 of the Transcript of Record.

The opinion of the United States District Court for the District of Columbia has not been officially reported. It appears at page 16 of the Transcript of Record.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

Question Presented.

Whether the mandatory language of Section 10(k) of the National Labor Relations Act compels the National Labor Relations Board to accord petitioner a hearing and to determine the dispute giving rise to an unfair labor practice charge within the meaning of Section 8(b)(4)(D) of that Act, or whether the Board may, as a result of its own preliminary *ex parte* investigation, refuse to hear and determine such dispute.

Statutes Involved.

Section 10(k) of the National Labor Relations Act (the construction of which is the crux of this petition) provides as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance

by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The other relevant provisions of the National Labor Relations Act, including Section 8(b)(4)(D), are set forth in the Appendix to petitioner's brief.

The pertinent provisions of the Administrative Procedure Act are also set forth in the Appendix to petitioner's brief.

Statement.

On or about September 2, 1947, the United Telephone Organizations, (hereinafter referred to as "UTO") by petitioner, its president, filed an unfair labor practice charge with the Regional Director of the National Labor Relations Board for the Second Region. This charge recited that it was filed "pursuant to Section 10(k)" of the Act. It alleged that Local 3 of the International Brotherhood of Electrical Workers, A. F. L., was engaging in unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act. This subsection of the Act describes conduct commonly referred to as the "jurisdictional dispute." In essence, the charge specified that Local 3 and its members concertedly refused, in the course of their employment, to work on any materials or perform any services in connection with conduit and telephone installations at Idlewild Airport in New York City, with the object of forcing the New York Telephone Company to assign particular work to employees who are members of Local 3 rather than to the employees of the Company who were members of UTO. The charge further specified that Local 3 threatened to have all American Federation of Labor building trades unions withdraw all their members from building construction work if con-

duit or telephone installations were erected by UTO (R. 2-3, 8-9).

On or about September 18, 1947, UTO filed a second charge with the same Regional Director. This charge alleged identical conduct by Local 3 in connection with telephone installation involved in the construction of various huge housing projects in the City of New York (R. 3-4, 10-11).

No hearings were held at any time in connection with either charge (R. 4-6).

However, almost a year after the filing of the charges, the Regional Director, on August 18, 1948, informed UTO that he was "refusing to issue complaint" in either matter (although Section 10(k) specifically calls, not for the issuance of complaints, but rather for the holding of a hearing and the making of a determination where charges of this sort have been filed) (R. 4, 5, 12). The Regional Director said he took his action "as a result of the investigation" after the charges had "been carefully investigated and considered" (R. 12).

UTO appealed the Regional Director's ruling to the General Counsel of the Board, who upheld the Regional Director. The General Counsel said that "like the Regional Director, the General Counsel concludes that there is insufficient evidence to warrant further proceedings" (R. 13). There was no hearing before the General Counsel.

UTO, thereupon, appealed to the Board. The Board held no hearings. It denied the appeal for the following reasons:

> "1. The Board is without authority to review actions of the General Counsel in refusing to issue complaints.
>
> 2. The Board is of the opinion that a hearing under the provisions of Section 10(k) of the Act is not mandatory and that the Regional Director upon

completion of investigation properly refused to issue a notice of hearing" (R. 14).

UTO, by petitioner, then brought suit against the Board and General Counsel in the District Court of the District of Columbia, predicating jurisdiction of that Court upon its general equity jurisdiction (Section 24(8) of the Judicial Code, 28 U. S. C. Section 1337) and upon Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A., Sections 1001 *et seq.*). UTO prayed that Court for a mandatory injunction ordering the Board to "hear and determine" the jurisdictional disputes in accordance with Section 10(k) (R. 6-7).

The Board moved to dismiss the Complaint on the grounds that: (a) the District Court was without jurisdiction of the subject matter of the action; and (b) the complaint failed to state a claim upon which equitable relief could be granted (R. 15).

The District Court, after hearing oral argument, entered an order denying the Board's motion (R. 16). The Court rendered an oral opinion supporting its order (R. 16-18). This opinion construed Section 10(k) to be mandatory and "to require the National Labor Relations Board to afford a hearing to persons making charges of this kind" (R. 18).

The Board, thereupon, elected not to plead further in this case, requesting the District Court, upon entry of its final order, to stay execution of same pending appeal (R. 18).

The District Court, on July 14, 1949, entered its order, directing the Board to hear and determine the jurisdictional disputes described in the charges filed by UTO. This order also stayed execution of same pending appeal by the Board (R. 19-20).

Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, that Court unanimously

reversed the decision of the District Court. The Court instructed the District Court to "dismiss the cause for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action" (R. 33).

The opinion of the Court of Appeals (R. 23-32), after stating that the "principal problem involves a construction of Section 10(k)", went on to say that the answer to whether the District Court lacked jurisdiction over the subject matter and the answer to whether the complaint stated a cause of action depended entirely upon the construction to be placed upon Section 10(k).

The Court of Appeals construed Section 10(k) as being mandatory (R. 25), but further construed its mandate to the Board to "hear and determine" the disputes as not becoming effective if the investigation of the Board's agents revealed that the disputes alleged in the charges do not constitute an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act (R. 25-26). The Court said that the Board has the "right to conduct investigations in 10(k) proceedings", and if such investigation makes out a *prima facie* violation of Section 8(b)(4)(D), then the mandate to the Board to "hear and determine" the underlying dispute becomes operative, "though not until then" (R. 30).

Reasons for Granting the Writ.

Whether the Board failed to heed the mandate of Section 10(k) of the Act by refusing, as a result of its own preliminary *ex parte* investigation, to "hear and determine" the jurisdictional dispute giving rise to petitioner's 8(b)(4)(D) unfair labor practice charge, presents a substantial, important and novel issue and should be reviewed by this Court.

The issue is novel because it is the first time this Court has been presented with the construction of this important

and far-reaching amendment to the National Labor Relations Act (i.e., Section 10(k)). Only once before, in *Inland Empire District Council, Lumber and Sawmill Workers Union, et al* v. *Millis, et al*, 325 U. S. 697 (1945), was this Court faced with the issue of the Board's duty to accord a hearing. In that case, petitioner therein complained of not having been afforded an "appropriate hearing" under Section 9(c) of the Act, because the Board conducted an election and certified a union as the collective bargaining representative of employees in a given bargaining unit without holding a "hearing" until *after* the certification. The Board, then, issued a supplemental decision, after its hearing, based upon the entire record. This Court, through the late Mr. Justice Rutledge, concluded that the hearing required by Section 9(c) was mandatory, but that the Board had complied with such mandate by holding a hearing before making an "effective determination" (325 U. S. 697, 708).

But, in the instant case, which involves the duty of the Board to hold a hearing under Section 10(k) of the Act, no hearing of any kind was held at any time.

The issue, in addition to being novel, is substantial. It involves the manner in which the Board shall deal with jurisdictional disputes. The issue does not involve "pernicious abstractions."[1]

In addition to being novel and substantial, the issue is important. Petitioner's complaint is that he is entitled to

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[1] The jurisdictional dispute is traditionally a source of bitter industrial strife. This strife has been especially marked between telephone workers and electrical workers. The War Labor Board was faced with many such disputes in the telephone field and did not fail to resolve them (11 WLB 625; 13 WLB 418; 14 WLB 569; 1 WLB 259). UTO and Local 3, IBEW (involved in the case at bar) have engaged in at least 9 jurisdictional disputes since 1938, some of which were in connection with huge projects like the World's Fair, Idlewild Airport, Airlines Terminal Building and the various housing projects. During the first 20 months of the Amended NLRA, there were 117 jurisdictional dispute charges filed with the Board and only 4 were accorded a hearing by the Board.

a hearing and determination under Section 10(k) and that the Board has refused to conduct such hearing and to render such determination. This Court has rarely denied review of the refusal of an administrative agency to afford a full and fair hearing before taking action (either positive or negative), especially where, as here, the Statute, which has created the agency and has endowed it with whatever powers it possesses, specifically "directs" that agency to "hear and determine" a particular type of dispute. Since the crux of the issue in the case at bar is whether Section 10(k) does or does not require the Board to hold a hearing and render a determination in a case of this sort, the issue basically involves a principle of law. This Court has power to pass judgment on such issue. In this respect, the statement of this Court in *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 160 (1939), is pertinent:

> "The Court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission."

The complaint of a petitioner that he has been refused the full and fair hearing which an administrative agency is, by statute, to accord him has been rarely denied review by this Court. *Inland Empire District Council etc.* v. *Millis et al., supra,* saw this Court reviewing the alleged failure of the National Labor Relations Board to hold the hearing required by Section 9(c) of the Act. In *Kansas City Southern R. R. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178 (1920), it was the I. C. C.'s alleged failure to conduct a full and fair hearing under Act of Mar. 1, 1913, C. 92, 37 Stat. 701 that came under the scrutiny of this Court. In *Morgan* v. *U. S.,* 298 U. S. 468 (1936), the alleged failure of the Secretary of Agriculture to accord petitioner therein

the full and fair hearing required by the Packers and Stockyards Act (42 Stat. 159, 7 U. S. C. 181-199) was reviewed by this Court. The complaint of petitioner, in *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294 (1932), that he had not been "heard" by the United States Tariff Commission in accordance with the provisions of the Tariff Act of 1922 (42 Stat. 858, 941) was, similarly, reviewed by this Court.

The above authorities make it apparent that, no matter what federal administrative agency happens to be involved, the question whether that agency has afforded the hearing and determination required by the statute which controls that agency's functions, is a matter of such importance as to obtain this Court's review.[2]

In the case at bar, it was conceded by the Board and the Court of Appeals that Section 10(k) of the Act is mandatory (R. 25, 30). However, the Court of Appeals construed that mandate as being inoperative until the Board, *after* its own *ex parte* investigation, has determined that there is a *prima facie* case establishing the existence of an 8(b)(4)(D) unfair labor practice (R. 26, 30).

This construction of Section 10(k) completely emasculates its mandatory effect. For, in any case where the Board (or its agents) decides against the feasibility of holding a hearing and making a determination under Section 10(k), it can avoid doing so by merely announcing that it finds no *prima facie* case establishing the existence of an 8(b)(4)(D) unfair labor practice. The Board, in its brief before the Court of Appeals (p. 23) stated that 117 charges

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[2] Indeed, in such cases as *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345 (1917); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 293 (1937); *Railroad Commission* v. *Pacific Gas & Elec. Co.*, 302 U. S. 388 (1938), and *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177 (1938), the issue of "full and fair hearing" has been recognized as involving the due process clause of the Constitution.

of 8(b)(4)(D) violations were filed with it in the first 20 months of the amended Act and that only 4 of such cases proceeded to a hearing. And in footnote 29 on p. 23 of its brief, the Board stated:

> "During the first twenty months of the amended Act, the Board had time to adjudicate a total of only 288 contested unfair labor practice cases. *Source:* N. L. R. B. Administrative Statistics Branch. Accordingly, if during this period the Board were required to hear and determine the disputes underlying all 117 of the 8(b)(4)(D) charges which were filed, its performance in other unfair labor practice cases would have been reduced by about 40%. Cf. N. L. R. B., *Thirteenth Annual Report* (Gov't. Print. Off., 1949), p. 108."

The above statistics, furnished by the Board, indicate that the refusals to proceed to hearing in all but 4 of the 8(b)(4)(D) charges under Section 10(k) of the Act were based upon expediency rather than upon the actual lack of a *prima facie* case, as disclosed by the Board's *ex parte* preliminary investigation, the conclusions of which are based upon considerations never made known to the petitioner.

Statutory rights are thus "whittled away" by an "erroneous statutory construction [which] lies hidden in vague findings" (Mr. Justice Douglas, speaking for the Court in *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942)).

The Court of Appeals placed great stress on the right and power of the Board to conduct investigations. Petitioner herein in no way contests the right and power of the Board to conduct investigations, but asserts that the Board cannot rely upon the results of such investigations to escape the duty mandatorily fixed upon it by Section 10(k) nor to deny petitioner the right to a hearing and

determination that such Section accords to him. The wrong to petitioner is especially aggravated where the considerations upon which the Board acted in its *ex parte* preliminary investigation have never been disclosed to petitioner.

The construction placed upon Section 10(k) by the Court of Appeals reduces its mandatory content to nothing more than an exercise of discretion by the Board. It raises the question of whether the direction to the Board to "hear and determine" the jurisdictional dispute is to have "legal effect." See *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938), where Hughes, C. J., speaking for the Court, said:

> "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to *'determine'*. The Commission must determine *'after hearing.'* The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect."

The Court of Appeals' construction placed upon Section 10(k) of the Act overlooks the introductory words of Section 10(k). These introductory words provide:

> "Whenever it is *charged* that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen * * *." (Emphasis supplied.)

The Court of Appeals' construction of the Section transforms "whenever it is *charged*" to "whenever it is *found*" —a drastic overhauling of a statute by judicial interpretation.

The Court of Appeals emphasizes the importance of the preliminary investigatory power of the Board by pointing out that, without it, the Board would have to conduct a hearing and render a determination even if (a) jurisdictional requirements would be lacking or (b) the complaining labor organization has not filed the necessary financial reports and non-Communist affidavits (R. 30, 31). These considerations are inapplicable to the case at bar, because (a) neither the jurisdictional nor filing requirements are at issue here, were not raised by the pleadings and actually are met, and (b) an investigation for *procedural* purposes to determine whether jurisdictional facts exist upon which to base invoking the Act or whether petitioner is *persona non grata* for failure to meet the Act's filing requirements cannot be extended to give the Board discretionary powers to deny petitioner's *substantive* right to a hearing under Section 10(k) which commands the Board to accord petitioner such hearing.

The Court of Appeals has permitted the Board to ignore the command of Section 10(k) by attempting to work out an adjustment of the mandatory language of Section 10(k) with other powers granted to the Board under various other sections of the Act (R. 28-29). This violates principles laid down by this Court in *Colgate-Palmolive-Peet Co.* v. *NLRB*,

338 U. S. 355 (1949), where the Board watered down Section 8(3) of the Act by its *Rutland Court* doctrine. By resorting to the same practice in the case at bar, the Board has exceeded its lawfully delegated authority.

> "* * * we must expect judicial review to continue its historic function as a brake on excursion by the administrative body beyond its lawfully delegated authority * * *." Final Report of the Attorney-General's Committee on Administrative Procedure, U. S. Government Printing Office, 1941, p. 77.

In addition to the above considerations, the case at bar involves a decision of the United States Court of Appeals for the District of Columbia Circuit on a question of substance relating to the construction and application of a statute of the United States which has not, but should, be settled by this Court.

Conclusion.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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